Jupiters Ltd (trading as Conrad International Treasury Casino) v Gan Kok Beng & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–276 OF 1999
VINCENT NG J
19 MARCH 2007

Conflict of laws — Contract — Illegality — Defendant suffered gambling losses at plaintiff's casino in Australia — Defendant issued plaintiff with six house cheques but countermanding these cheques by instructing his bank not to honour these cheques — Whether law applicable to the substantive issue is that of Queensland, Australia or Malaysia

Contract — Illegality — Gaming or wagering — Defendant suffered gambling losses at plaintiff's casino in Australia — Defendant issued plaintiff with six house cheques but countermanding these cheques by instructing his bank not to honour these cheques — Whether plaintiff could found an action on the said six cheques — Whether plaintiff could pursuant to s 26(2) Civil Law Act 1956 and/or s 31(1) Contracts Act 1950 and/or public policy bring or maintain this suit in any courts in Malaysia

The defendants had sought prior summary determination of questions of law pursuant to O 33 r 2 read with r 5 of the Rules of High Court 1980 ('RHC') and/or under O 92 r 4 of the RHC. This was agreed to by the plaintiff and the order for such determination was then made. The plaintiff runs a casino by the name of 'Conrad International Treasury Casino' in the City of Brisbane, in the State of Queensland, Australia. The first defendant engaged in certain gaming activities in the plaintiff's casino on several occasions. He suffered gambling losses and to settle such gambling debts he issued the plaintiff with six house cheques. The plaintiff received these cheques and within the time limited by law, presented them at the City Bank Berhad in Kuala Lumpur, being the defendants' paying bank. Unfortunately, for the plaintiff the said six cheques could not be realized due to the first defendant countermanding these cheques by instructing his bank not to honour these cheques. The first defendant operated a joint account with his wife, the second defendant. The plaintiff stated that their cause of action was purely based on the alleged dishonour of the said six cheques simpliciter, ie without the onus of having to prove the underlying contract for which the cheques were given. The first defendant averred that the plaintiff had not given valuable consideration for each of the said six cheques and was therefore void. And, he also pleaded in the alternative that if at all there was consideration, the consideration was illegal or unlawful and was therefore void. The second defendant had pleaded that the claim was devoid of any cause of action against her though it was apparent that she was sued solely because she was the joint accountee of the account against which the cheques were drawn. It was common ground that she was not signatory of any one of the said six cheques. The three issues

to be determined were: (i) whether the plaintiff could found this action on the said six cheques; (ii) whether the plaintiff could pursuant to s 26(2) Civil Law Act 1956 and/or s 31(1) of the Contracts Act 1950 and/or public policy bring or maintain this suit in any courts in Malaysia; and (iii) whether the law applicable to the substantive issue is that of Queensland, Australia or Malaysia.

Held, dismissing the suit against the defendants:

(1) Clearly the relevant legislation governing the said six cheques was the Bills of Exchange Act 1949 and the Contracts Act 1950 since these cheques were dishonoured, and the claim thereon instituted here. Section 26(1) of Civil Law Act declared that the enforcement of a gaming contract was void in abnitio. Thus, in the court's opinion the principle of nudum pactum ought to apply, as was confirmed in the *Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 3 SLR 412 ('*Star Cruise*') and the*Pet Far Eastern(M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558 ('*Pet Far Eastern*'). And, s 27 of the Bills of Exchange Act 1949 clarified the type of valuable consideration acceptable. Section 26 of the Civil Law Act and s 31 of the Contracts Act expressly stipulated that all agreements by way of gaming or wagering shall be null and void. As the cheques were issued for the settling of gambling losses to the plaintiff, it followed therefore that the cheques were given for no consideration by virtue of s 26 of the Civil Law Act and s 31 of the Contracts Act. Although s 30 of the Bills of Exchange Act only raised a presumption of value and good faith, it had to be read with s 27 of the Bills of Exchange Act and ss 2(d), 24 and 25 of the Contracts Act (see paras 13, 17 & 21).

(2) The question whether a wagering or gaming debt was recoverable would involve two different and separate considerations which involve two concepts, namely Lex Loci and Lex Fori. A gaming or wagering contract might be lawful and legal under its Lex Loci — being the law of the country in which the wagering or gaming activity was carried out or the transaction where it was performed. Yet, it was settled that the Lex Fori of the action or suit — being the law of the country in which the action was brought or sought to be litigated — that should prevail over the Lex Loci of the wagering transaction. Thus, even if a wagering contract was lawful and not void according to its Lex Loci - such as through the granting of exemptions or licence to a Casino by the Minister — it was still unenforceable if it was a null and void contract according to the Lex Fori of the action. Obviously, the Lex Fori of the current action was the Malaysian Law (see para 57).

(3) Even if Queensland's law was applicable, the plaintiff had failed to plead that it had met the requirements laid down pursuant to Queensland Casino Control Act 1982. Since the cause of action (arising solely from the dishonour of the said six cheques issued upon a wagering contract) was sought to be litigated here, Malaysian law must be applicable. In any event, it was also not the plaintiff's case that there was an expressed agreement by the defendants that the Queensland's law shall apply in the event of any dispute between the parties (see para 61).

Obiter:

In the case of *The Ritz Hotel Casino Ltd & Anor v Datu Seri Osu Haji Sukam* [2005] 6 MLJ 760 Ian Chin J had comprehensively and admirably dealt with the issue of public policy. However, with the greatest respect to the good judge this court was of the view that the learned judge had failed to accord crucial focus on the patent fact that the applicant had merely applied to register a judgment legally obtained in England pursuant to the Reciprocal Enforcement of Judgments Act 1958, but had not sought to enforce a cause of action founded on a gaming or wagering contract — in which case the Lex Fori of the country where the cause of action was sought to be litigated would have to prevail. Surely, it would be entirely consistent with our public policy for our courts to accord due recognition to any reciprocal arrangements between our country and another (see para 60).

[Bahasa Malaysia summary

Defendan-defendan telah memohon satu penentuan terus awalan atas persoalan undang-undang mengikut A 33 k 2 dibaca bersama k 5 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') dan/atau di bawah A 92 k 4 KMT. Ini dipersetujui oleh plaintif dan satu perintah untuk penentuan sedemikian kemudiannya dibuat. Plaintif mengendalikan satu kasino yang bernama 'Conrad International Treasury Casino' di Bandaraya Brisbane, Negeri Queensland, Australia. Defendan pertama telah berjudi di kasino plaintif beberapa kali. Beliau mengalami kerugian berjudi dan untuk menyelesaikan hutang perjudian, beliau telah mengeluarkan enam keping cek-cek kepada plaintif. Plaintif menerima cek-cek tersebut dan dalam tempoh yang dihadkan oleh undang-undang telah mengemukakan cek-cek tersebut kepada City Bank Berhad di Kuala Lumpur, yang merupakan bank pembayar defendan-defendan. Malangnya bagi plaintif, keenam-enam cek tersebut tidak dapat dibayar oleh kerana defendan pertama telah membatalkan cek-cek tersebut dengan mengarahkan banknya supaya tidak melayan/membayar cek-cek tersebut. Defendan pertama mempunyai satu akaun bersama dengan isterinya, defendan kedua. Plaintif menyatakan kausa tindakan mereka adalah berdasarkan hanya pada ketidaklayanan keenam-enam cek tersebut, iaitu tanpa beban membuktikan kontrak yang menjadi asas di mana cek-cek tersebut diberikan. Defendan pertama menyatakan bahawa plaintif telah tidak memberi balasan bernilai untuk setiap daripada enam cek-cek tersebut dan dengan itu terbatal. Dan, beliau juga memplid sebagai alternatif bahawa sekiranya terdapat balasan, balasan tersebut adalah menyalahi undang-undang dan dengan itu terbatal. Defendan kedua memplidkan bahawa tuntutan tersebut adalah tanpa sebarang kausa tindakan terhadapnya oleh kerana ia jelas bahawa beliau di saman hanya kerana beliau memegang satu akaun bersama yang mana cek-cek tersebut kena dibayar. Ia adalah diketahui semua bahawa beliau bukannya penandatangan kepada mana-mana daripada enam cek-cek tersebut. Tiga isu-isu untuk keputusan ialah: (i) sama ada plaintif boleh berdasarkan tindakannya atas keenam cek-cek tersebut; (ii) sama ada plaintif boleh mengikut s 26(2) Akta Undang-Undang Sivil 1956 dan/atau s 31(1) Akta Kontrak 1950 dan/atau polisi awam membawa atau mempertahankan guaman ini di mana-mana mahkamah di Malaysia; dan (iii) sama ada undang-undang yang terpakai kepada isu substantif ialah undang-undang Queensland, Australia atau Malaysia.

Diputuskan, menolak guaman terhadap defendan-defendan:

(1) Ia adalah jelas bahawa perundangan yang sesuai mengawal keenam-enam cek tersebut adalah Akta Bil Pertukaran 1949 dan Akta Kontrak 1950 oleh kerana cek-cek tersebut tidak dilayani, dan hasil daripada itu tuntutan yang dibuat di sini. Seksyen 26(1) Akta Undang-Undang Sivil menyatakan bahawa penguatkuasaan kontrak perjudian adalah terbatal in abnitio. Dengan itu, pada pendapat mahkamah prinsip nudum pactum patut dipakai, seperti yang telah ditetapkan oleh *Star Cruise Services Ltd v Overseas Union Bank Ltd* [1999] 3 SLR 412 ('*Star Cruise*') dan *Pet Far Eastern(M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558 ('*Pet Far Eastern*'). Dan s 27 Akta Bil Pertukaran 1949 menjelaskan jenis balasan bernilai yang dapat diterima. Seksyen 26 Akta Undang-Undang Sivil dan s 31 Akta Kontrak secara nyata memperuntukkan bahawa kesemua perjanjian-perjanjian melalui perjudian atau pertaruhan harus dianggap terbatal dan tidak sah. Oleh kerana cek-cek tersebut dikeluarkan untuk menyelesaikan satu kerugian perjudian kepada plaintif, maka dengan itu cek-cek tersebut diberikan tanpa balasan mengikut s 26 Akta Undang-undang Sivil dan s 31 Akta Kontrak. Walaupun s 30 Akta Bil Pertukaran hanya membangkitkan satu anggapan nilai dan suci hati, ia mesti dibaca bersama s 27 Akta Bil Pertukaran dan ss 2(d), 24 dan 25 Akta Kontrak.

(2) Soal sama ada satu hutang pertaruhan atau perjudian boleh diperoleh kembali akan melibatkan dua pertimbangan yang berbeza dan berlainan yang melibatkan dua konsep, iaitu Lex Loci dan Lex Fori. Satu kontrak pertaruhan dan perjudian mungkin mengikut undang-undang dan sah di Lex Loci — iaitu undang-undang di negara di mana aktiviti pertaruhan dan perjudian dijalankan atau di mana transaksi dilakukan. Walau bagaimanpun, ia adalah mantap bahawa Lex Fori tindakan atau guaman tersebut — yang menjadi undang-undang negara di mana tindakan tersebut dibawa atau dituntut untuk dibicarakan — ia harus mengatasi Lex Loci transaksi pertaruhan tersebut. Dengan itu, sekiranya satu kontrak pertaruhan adalah mengikut undang-undang dan tidak terbatal menurut Lex Locinya — seperti melalui pemberian pengecualian atau kasino dilesenkan oleh Menteri — ia masih tidak dapat dikuatkuasakan sekiranya ia adalah kontrak yang terbatal dan tidak sah mengikut Lex Fori tindakan tersebut. Ia adalah jelas Lex Fori tindakan ini adalah undang-undang Malaysia (lihat perenggan 57).

(3) Walaupun undang-undang Queensland dipakai, plaintif telah gagal memplidkan bahawa ia menemui keperluan-keperluan yang diperuntukkan mengikut Akta Kawalan Kasino Queensland 1982. Oleh kerana kausa tindakan (yang berbangkit hanya atas keenam-enam cek yang tidak dilayan yang dikeluarkan atas satu kontrak pertaruhan) yang dituntut untuk dibicarakan di sini, undang-undang Malaysia seharusnya terpakai. Dalam apa juga keadaan, ia bukan kes plaintif bahawa terdapat satu perjanjian yang nyata oleh defendan-defendan bahawa undang-undang Queensland harus dipakai sekiranya terdapat sebarang pertikaian di antara pihak-pihak (lihat perenggan 60).

Obiter:

Dalam kes *The Ritz Hotel Casino Ltd & Anor v Datu Seri Osu Haji Sukam* [2005] 6 MLJ 760 Ian Chin H telah secara menyeluruh mempertimbangkan dengan baik isu

polisi awam. Akan tetapi dengan segala hormat kepada hakim bijaksana tersebut, mahkamah ini berpandangan bahawa hakim bijaksana tersebut telah gagal memberikan fokus yang penting atas fakta yang jelas bahawa pemohon telah hanya memohon untuk mendaftarkan satu penghakiman yang diperoleh mengikut undang-undang di England mengikut Akta Penguatkuasaan Salingan Hukuman 1958, tetapi tidak memohon untuk menguatkuasakan satu kausa tindakan yang berdasarkan satu kontrak perjudian atau pertaruhan — dalam mana Lex Fori negara di mana kausa tindakan yang dipohon untuk dibicarakan akan mengatasinya. Tentunya, ia adalah konsisten dengan polisi awam untuk mahkamah kita memberi pengiktirafan kepada sebarang persetujuan salingan di antara negara kita dan yang lain.]

Notes

For cases on gaming and wagering, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4171–4174.

For cases on illegality of contract, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1618–1624.

Cases referred to

Aspinall Curzon Ltd v Khoo Teng Hock [1991] 2 MLJ 484 (refd)
Banque Nasionale De Paris v Wuan Swee May & Anor [2000] 3 MLJ 587 (refd)
Chaplin v Boys [1969] 2 All ER 1085 (refd)
Courts & Co v Browne-Lecky [1947] KB 104 (refd)
Cowern v Nield [1912] 2 KB 419 (refd)
Development & Commercial Bank Bhd v Brimal Sdn Bhd (Syarikat Oriental Elastic Industries, Third Party) [1991] 3 MLJ 187 (refd)
Fitch v Jones (1855), 5 E & B 238 (refd)
Hill v William Hill (Park Lane) Ltd [1949] SLR 452 (refd)
Hope v Hope (1857) De GM & G 731; 44 ER 572 (refd)
John Edwards & Co v Motor Union Insurance Co Ltd [1922] 2 KB 249 (refd)
Jupiters v Lim Kin Tong [2006] 5 CLJ 277 (refd)
Kong Yee Lone & Co v Lowjee Nanjee (1901) 28 Ind App 239 (refd)
Las Vegas Hilton Corp v Khoo Theng Hock Sunny [1997] 1 SLR 341 (refd)
Levene v Brougham (1909) 25 TLR 265 (refd)
Loh Che Song v Liew Yong Chian [1998] 2 SLR 641 (refd)
Moulis v Owen [1907] 1 KB 746 (refd)
Ong Guan Hua v Chong [1963] MLJ 6 (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558 (refd)
Richardson v Moncrieffe (1926) 43 TLR 32 (refd)
Ritz Hotel Casino Ltd & Anor, The v Datu Seri Osu Haji Sukam [2005] 6 MLJ 760 (distd)
Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong (sued pursuant to s 9(c) of the Societies Act 1966 in his capacity as the Chairman of the Kelab Lumba Kuda Sandakan) [1995] 3 CLJ 256 (refd)
Sharp v Ellis; Re Edward Love & Co Pty Ltd (1971) 20 FLR 199 (refd)
Soltykoff, Re; ex p Margrett [1891] 1 QB 413 (refd)
Star City Pty Ltd v Tan Hong Woon [2002] 2 SLR 22 (refd)
Star City Pty Ltd v Tan Hong Woon [2001] 3 SLR 206 (refd)
Star Cruise Services Ltd v Overseas Union Bank Ltd [1999] 3 SLR 412 (refd)

Sun Cruises Ltd v Overseas Union Bank Ltd [1999] 3 SLR 404 (refd)
Swan v Bank of Scotland (1836) 10 Bligh NS 627; 6 ER 231 (refd)

Legislation referred to

Bills of Exchange Act [UK] s 72(3)
Bills of Exchange Act 1949 ss 27, 30, 72(c)
Casino Control Regulation 1984 [Queensland, Aust] reg 14
Casino Control Act 1982 [Aust] ss 66, 67, 68, 69, 70
Cheques Act 1986 [Queensland, Aust] ss 31, 71
Civil Law Act [Sing] ss 5(2), 6
Civil Law Act 1956 ss 5(2), 26
Common Gaming House Act 1953 s 27A
Contracts Act [India] s 30
Contracts Act 1950 ss 2(d), 24, 25, 31(1)
Gaming Act 1845 [UK] s 18
Gaming Act 1892 [UK] s 1
Racing and Betting Act 1980 [Queensland, Aust] ss 68(1), 248, 249
Reciprocal Enforcement of Judgments Act 1958 s 4

Rishwant Singh (Shearn Delamore & Co) for the plaintiff.
Mabel James (Hamzah Sulaiman & Partners) for the defendants.

Vincent Ng J:

THE APPLICATION

[1] By the application vide encl 51, the defendants have sought prior summary determination of questions of law pursuant to O 33 r 2 read with r 5 of the Rules of High Court 1980 ('RHC') and/or under O 92 r 4 of the RHC. This was agreed to by the plaintiff and the order for such determination was then made. The agreed facts and issues for determination was finally arrived at only on 13 March 2006, and the documents for study and consideration are as contained in the agreed bundle captioned 'Ikatan Dokumen-Dokumen'.

THE BRIEF FACTS

[2] The plaintiff runs a casino by the name of 'Conrad International Treasury Casino' in the City of Brisbane, in the State of Queensland, Australia. The casino conducts lawful activities in accordance with the laws of the State of Queensland, Australia. The material Queensland statute which governed such activities is the Casino Control Act, 1982 of Queensland, Australia. The First Defendant engaged in certain gaming activities in the plaintiff's casino on several occasions. He suffered gambling losses and to settle such gambling debts he issued the plaintiff with six house cheques (cheque forms printed by the Casino) being cheque numbers 03947 for RM 389,295 dated 9 February 1998, 03956 for RM378,645 dated 11 February 1998, 03959 for RM519,060 dated 12 February 1998, 02484 for RM26,242 dated 16 February 1998, 03964 for RM533,06060 dated 14 February 1998 and 03963 for RM195,718.81 dated 12 February 1998 (exhibited in pp 2 to 7 of 'Ikatan Dokumen-Dokumen' — hereinafter called 'the said six cheques'). The plaintiff

received these cheques and within the time limited by law, presented them at the City Bank Berhad in Kuala Lumpur, being the defendants' paying bank. Unfortunately, for the plaintiff the said six cheques could not be realized due to the First defendant countermanding these cheques by instructing his bank not to honour these cheques.

THE AGREED FACTS

[3] The agreed facts as set out in the statement of agreed facts are as follows:

(a) the first defendant gambled at the plaintiff's casino in Brisbane, Queensland, Australia;

(b) the first defendant executed the said six cheques in favour of the plaintiff to settle his gambling losses to the plaintiff;

(c) the plaintiff presented these six house cheques at the paying bank, Citibank Berhad in Kuala Lumpur, which were dishonoured and resulted in the present action by the plaintiff;

(d) the first and second defendants at all times were husband and wife with an address at c/o 4th Floor, Jalan Bukit Bintang, 55100 Kuala Lumpur;

(e) the defendants did at all material times operate a joint account no 17140140094534011 with Citibank Berhad with authority to either one of them to sign cheques.

THE ISSUES

[4] The three issues to be determined in this application have been thus stated in the statement of agreed issues filed:

(i) whether the plaintiff can found this action on the said six cheques?

(ii) whether the plaintiff can pursuant to s 26(2) Civil Law Act 1956 and/or s 31(1) of the Contracts Act 1950 and/or Public Policy bring or maintain this suit in any courts in Malaysia?

(iii) whether the law applicable to the substantive issue is that of Queensland, Australia or Malaysia?

THE PLAINTIFF'S CASE

[5] The plaintiff says that its claim is founded on the said six cheques issued in Australia but drawn on and payable by a bank in Malaysia as particularized in para 5 of the statement of claim. And, that their cause of action is purely on the alleged dishonour of the said six cheques simpliciter, ie without the onus of having to prove the underlying contract for which the cheques were given.

THE DEFENDANTS' CASE

[6] The first defendant says that if the cause of action is on the dishonour of the said six cheques simpliciter, his answer is contained in paras 9.11, 9.12 of the

re-amended statement of defence in which he has averred that the plaintiff has not given valuable consideration for each of the said six cheques and is therefore void. And, he has also pleaded in the alternative that if at all there is consideration, the consideration is illegal or unlawful and is therefore void.

[7] The second defendant has pleaded that the claim is devoid of any cause of action against her though it is apparent that she is sued solely because she is the joint accountee of the account against which the cheques were drawn. It is common ground that she was not signatory of any one of the said six cheques.

THE FIRST ISSUE

Whether the plaintiff can found this action on the cheques?

Rationale and Decision

[8] Firstly, I have bear in mind that clearly the relevant legislation governing the said six cheques is the Bills of Exchange Act 1949 and the Contracts Act 1950 since these cheques were dishonoured, and the claim thereon instituted here. Section 72(c) of the Bills of Exchange Act 1949 states that:

> (c) the duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured; …

[9] Section 72(c) of the Bills of Exchange Act 1949 (Malaysia) is in pari materia with s 72 (3) of the English Bills of Exchange Act (UK).

[10] The general principle of law is found in *Halsbury's Laws of Malaysia* at p 457 which states as follows:

> It is therefore of the highest importance to determine by what principles the rights and liabilities of the various parties are to be governed where the laws of more than one country are concerned. The principle adopted with regard to negotiable instruments is in general that the lex loci contractus should prevail.

[11] However, an exception to the general law is set out in the footnote for the above said paragraph which reads as follows:

[12] A notable exception is the question of legality: see *Moulis v Owen* [1907] 1 KB 746, (CA, England) (*Moulis*), and *Dicey and Morris Conflicts of Laws* (11th Ed) pp 1320–1321, where the authors are of the view that any contract embodied in a negotiable instrument must be legal according to the law governing the bill or note and also according to its proper law …

[13] In *Jupiters v Lim Kin Tong* [2006] 5 CLJ 277 (Jupiters), His Lordship Ramli J concluded that his court is inclined to follow the decision in *Moulis* for the following reasons:

> In the case of *Moulis v Owens* (1907) 1 KB 746, the issue before the English Court of Appeal was weather the Gaming Act of 1845 and the Gaming Act of 1892 applied to gaming carried on in a foreign country where gaming was legal. In that case, the defendant gave the plaintiff in Algiers a cheque drawn by him on a English bank, partly in payment of money lent by the plaintiff to the defendant to enable the defendant to play at baccarat in a club at Algiers and, as to balance, to be applied by the plaintiff in discharging debts incurred by the defendant when playing at baccarat in the club. The consideration for the cheque was legal according to the law of France. In an addition on the cheque, it was held by Collins MR and Cozens-Hardy LJ (Fletcher Moulton LJ dissenting) that in as much as the transaction was governed by the English law, the cheque must be deemed to have been given for an illegal consideration and that the action was therefore, not maintainable.
>
> At p 753, it was held that the joint effect of s 18 of the Gaming Act 1845 and s 1 of the Gaming Act 1892, is that such contract would be rendered null and void and no action shall be brought or maintained to recover any such sum of money. This decision has stood the test of time. This decision is a statutory defence and therefore it is necessary to see if there is similar legislation in our jurisdiction. The English Gaming Act 1845, s 18 prohibits an action being 'brought or maintained in any Court of Law and Equity' for 'any sum of money or valuable thing alleged to be won an a wager.' A similar provision is found in our Civil Law Act 1956, in which s 26(2) also prohibit an action being 'brought or maintained in any Court for recovery of any sum of money or valuable thing alleged to be won on a wager … '.
>
> Section 1 of the Gaming Act 1892 is in pari materia with s 26(4) of Civil Law Act 1956 (Malaysia). It is clear and unambiguous that from reading the two Malaysian provisions of ss 26(2) and 26(4) of the Civil law Act 1956 as well as the English Gaming Acts (1845 and 1892) the Malaysian law is in pari materia with the laws as in England. This court is more inclined to follow the decision in *Moulis* where in that case the action was dismissed with costs. It follows that the plaintiff in the present case is prohibited from bringing or maintaining any action or suit to claim a gaming debt in the Court of Malaysia by virtue of those provisions. This is a statutory prohibition. There is no exception to this statutory prohibition.

[14] It is now apparent that *Moulis* is a case involving not just a loan but also more importantly the lex fori of the country where payment of monies won from gaming was sought to be enforced and for this reason *Moulis* is relevant. Despite the dissenting decision of Lord Justice Fletcher Moulton the other two judges were the view that as the transaction was governed by English Law, the cheque must be deemed to be given for an illegal consideration and that the action was therefore not maintainable. And, from the facts in the case before me the plaintiff has agreed and admitted that the purpose of the said six cheques is to settle gaming losses here though incurred by the first defendant at the plaintiff's casino in Queensland.

[15] Further, the Court of Appeal, in the case of *Ong Guan Hua v Chong* [1963] MLJ 6 (*Ong Guan Hua*), has held that the court's correct approach on the question of gaming is to consider the corresponding English Gaming Acts in the light of local statutes. Thompson CJ had this to say:

> … In Malaya there is no distinction between wagering on games and other types of gaming and in every case the question of gaming is to be considered in the light of the local statutes which correspond to the English Gaming Acts of 1845 and 1892.

[16] Notably, in that case the casino operators had contended that they were deemed to have provided good consideration in return for the payment of cheques.

[17] Section 26(1) of our Civil Law Act declares that the enforcement of a gaming contract is void in abnitio. Thus, in my opinion the principle of nudum pactum ought to apply, as was confirmed in the *Star Cruise Services Ltd v Overseas Union Bank Ltd***.** [1999] 3 SLR 412 ('*Star Cruise*') and the *Pet Far Eastern(M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558 ('*Pet Far Eastern*'). And, s 27 of the Bills of Exchange Act 1949 clarifies the type of valuable consideration acceptable. For the meaning of 'consideration' we turn to s 2(d) of the Contracts Act 1950 which reads:

> When, at desire of a promisor, the promisee or any other person has done or abstained from doing, or does or abstain from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promisor

[18] Further, s 24 of the Contracts Act 1950 inter alia provides that the consideration is lawful unless:

> (b) it is of such a nature that, if permitted, it would defeat any law; or
>
> (e) the Court regards it as immoral, or opposed to public policy.

[19] Chalmers — on *Bills of Exchange Cheques and Promissory Notes* (15th Ed) — in dealing with s 72 of the English Bills of Exchange Act (which is in pari materia with our s 72) pertaining to the rules of conflict of laws, states, (at p 573 para 1791) that:

> All of these rules are nevertheless subject to the overriding principle that a contract will not be enforced in the English courts — whatever maybe the applicable law — if its enforcement would be against the public policy of this country or contrary to a statute that must be applied regardless of the conflict of laws.

[20] In *Ong Guan Hua*, at the High Court level before Sufian J, the plaintiff had sued the second defendant on the basis of certain dishonored cheques. In his defence the second defendant argued that the cheques were given in part-payment of the losses in respect of gaming transactions. Sufian J accepted the Second defendant's contention and held that by reason of s 26(4) of the Civil Law Ordinance, the transaction is void.

[21] Section 26 of the Civil Law Act and s 31 of the Contracts Act expressly stipulate that all agreements by way of gaming or wagering shall be null and void. The plaintiff has admitted in the statement of agreed facts that the cheques were issued for the settling of gambling losses to the plaintiff. It follows therefore that the cheques were given for no consideration by virtue of s 26 of the Civil Law Act and s 31 of the Contracts Act. This court must be mindful that these two provisions are

specific provisions directed at gambling. And, that this is indeed the crux of the defendants' defence. The court has to inquire into the underlying transaction and go behind the cheque, more so, where the defendants have pleaded at para 9 of the re-amended statement of defence that there is no consideration at all for the contract. Though s 30 of the Bills of Exchange Act only raises a presumption of value and good faith, it has to be read with s 27 of the Bills of Exchange Act and ss 2(d), 24 and 25 of the Contracts Act.

[22] Section 27 of the Bills of Exchange Act reads:

> 27. Value and Holder for value
>
> (1) any consideration sufficient to support a simple contract.

[23] And, s 30 of the same Act provides that:

> 30. Presumption of value and good faith
>
> (1) Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value.
>
> (2) Every holder of a bill is prima facie deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

[24] Section 25 of the Contracts Act states as follows:

> 25. Agreement void if considerations and objects unlawful in part
>
> If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

[25] Thus, clearly in my view the presumption in s 30 of the Bills of Exchange Act does not apply here.

[26] The collective effect of all the above statutory provisions is to place the onus of proof on the plaintiff to establish the fact that valuable consideration was indeed given. This, the plaintiff has failed to discharge.

[27] The reliance by the plaintiff on the *Development & Commercial Bank Bhd v Brimal Sdn Bhd (Syarikat Oriental Elastic Industries, Third Party)* [1991]3 MLJ 187 is misplaced. That case can be distinguished from the present case, for in that case there was neither fraud nor illegality nor failure of consideration pleaded in the statement of defence (see p 187 para H of that report). Whereas, in the instant case before me failure of consideration has been pleaded in the statement of re-amended defence. We must be mindful that both ss 26 of the Civil Law Act and 31 of the Contracts Act debars any contracts which involves the generic activity of gambling. It follows that the plaintiff having in the statement of agreed facts admitted that it was indeed a gambling activity herein, it is simply void and becomes a *nudum*

pactum, devoid of any consideration. Thus, on the first issue, it is clear to me that the plaintiff cannot found its action on the six cheques in Malaysian courts since it is the law that consideration must be lawful at all times, and any illegality of the consideration cannot be ignored. Take for an example, if a cheque is issued to a government servant for the payment of a bribe, certainly the recipient of the cheque cannot sue on it because the underlying contract is illegal. Likewise in a commercial context, if the goods are subsequently found to be not merchantable at all, the underlying contract having been breached, the issuer of the cheque has a good reason to stop payment on the cheque.

SECOND ISSUE

Whether the plaintiff can pursuant to s 26(2) of the Civil Law Act 1956 and/or s 31(1) of the Contracts Act 1950 and/or public policy bring or maintain this suit in any courts in Malaysia?

Rationale and Decision

[28] Section 26 of the Civil Law Act 1956 reads:

> 26. Agreement by way of gaming or wagering to be null and void
>
> (1) All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void.
>
> (2) No action shall be brought or maintained in any Court for recovering any sum of money or valuable thing alleged to be won upon any wager or which has been deposited in the hands of any person to abide the event on which any wager has been made.
>
> (3) Subsections (1) and (2) shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or toward any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime or exercise.

[29] Section 26 of the Civil Law Act 1956 of Malaysia is a verbatim word re-enactment of s 18 of the Gaming Act 1845 and is substantially similar to s 1 of the Gaming Act 1892 of England. It is also in pari materia to s 6 of the Civil Law Act Singapore.

[30] In *Star Cruise* GP Selvam J. had occasion to deal with s 6 of the Singapore provision which is similar to our s 26 of the Civil Law Act 1956. On the principle of *nudum pactum* (which means an empty contract) His Lordship spelt out the essence of its concept (at p 439) in the following succinct terms:

> The meaning and effect of the matrix concept void contract or nudum pactum are multifaceted and multidirectional. The following propositions flow from the concept of nudum pactum.
>
> (i) When a contract is made void by a statute, no right or obligation can arise from it. It is deprived of all legal force. It is a nudum factum. It cannot be sued upon. The pretended contract is no contract at all. No subsequent right can be founded on it. Something

cannot spring from nothing. See *Swan v Bank of Scotland (a case on the Stamp Act)* (1836) 10 Blight NS 627; 6 ER 231, *Cowern v Nield* [1912] 2 KB 419 (contract void under *Infants Relief Act), and John Edwards & Co v Motor Union Insurance Co Ltd* [1922] 2 KB 249. The following statement by Gillard J in *Sharp v Ellis*; Re Edward Love & Co Pty Ltd (1971) 20 FLR 199 at p.205 embodies the first principle on a void contract.

If the original agreement were rendered null and void by the existing law and one party performed his part of the illusory bargain, such performance would be without any contractual significance whatever and no right or remedy, either expressly or impliedly, would arise from that performance in his favour.

(ii) Accordingly, any security such as bill or note given in respect of a void contract is itself void. See *Richardson v Moncrieffe* (1926) 43 TLR 32, *Levene v Brougham* (1909) 25 TLR 265, *Re Soltykoff, ex p Margrett* [1891] 1 QB 413 (CA) and *Kong Yee Lone & Co v Lowjee Nanjee* (1901) 28 Ind App 239 (PC). In England a security given in respect of a gaming transaction is illegal and not void because the Gaming Act 1835 says it is so, even though logically it is not so.

(iii) So, a guarantee of a void contract is itself void. See *Courts & Co v Browne-Lecky* [1947] KB 104. See also *Swan v Bank of Scotland* (1836) 10 Bligh NS 627; 6 ER 231, a case on the Stamp Act. By the same logic, therefore, a mortgage given by a mother to secure the gambling debt of her prodigal son could be void.

The conclusion to be drawn from the above proposition is that no action can arise from a void dealing and anything based on it because the transaction is deprived of all legal force and effect of it and it is not based on illegality. As Lord Brougham put it succinctly in *Swan v Bank of Scotland* (1836) 10 Bligh NS 634 at p 636: 'If there is nothing due the obligation to make good that nothing good amounts itself to nothing.' Lord Mansfield called a wagering contract 'a good for nothing contract'.

Further in his Lordship judgment, he also said (at p 449):

Eusoff Chin J in the *Aspinall Curzon* case implied that the moment the Minister issued a licence, that licence overrode the Malaysian equivalent of s 6 of CLA and s 18 Gaming Act 1845. *Lipkin Gorman* is a clear illustration of a casino operating under licence. Yet the gaming contract was void. Innumerable cases support the proposition that gaming and wagering, though they may be lawful, are not valid. They are all void by ss 6(1) and (2) of the CLA. It follows, therefore, that public policy of one kind permits some form of gaming and betting in some places, but public policy of another kind voids all contracts of gaming and wagering and prohibits an action being brought on gaming debts. The two should not be confounded.

[31] Thus, in my view, when a contract is made void by statute in the *Lex Fori* of the action, no right or obligation can arise from it. It is deprived of all legal force for being a nudum pactum. It cannot be sued upon. No subsequent right can be founded on it. Something cannot spring from nothing. Any security such as bill of exchange or note given in respect of a void contract is itself void. A guarantee of a void contract is itself void, and so also, for example a mortgage given by a mother to secure the gambling debt of her prodigal son would be void.

[32] In the Malaysian context the above proposition was put forward in two cases, one in the Court of Appeal and the other in the High Court. Thomson CJ, in the

Court of Appeal, in the *Ong Guan Hua* — who quoted the dicta of Lord Campbell CJ in the appellate court in the case of *Fitch v Jones* (1855), 5 E & B 238 (passage at p 7) — said as follows:

> The question therefore comes to be whether this note was given for a consideration merely equivalent to no consideration or whether the note was given in an illegal transaction. I'm of opinion that the note did not take its inception in illegality within the meaning of the rule. The note was given to secure payment of a wagering contract, which, even before stat.8&9 Vict C 109, the law would not enforce … but it was not illegal: there is no penalty attached to such a wager: it is not in violation of any statute nor of the common law, but is simply void, so that the consideration was not an illegal consideration, but equivalent in law to no consideration at all …

[33] Abdul Malik Ishak J in *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999]5 MLJ 558 ('*Pet Far Eastern*'), at p 578A observed that:

> … the Malaysian law does not recognize gambling contracts or transactions and these are considered void. In Latin language it is nudum pactum. In English, it means an empty contract. As an empty contract, no legal right or liability can arise from it. As far as the Malaysian law is concerned, it makes no difference even if the gambling has taken place in another country which allows a claim for a gambling debt the law is double edged. A gambling den cannot sue its loser for a gambling debt and neither can a winner claim from the gambling den if he is given a dud cheque … When the second defendant's cruise ship carried out its gambling operations in international waters, it knew that things could go wrong. Things did go wrong and in such a case, no civilized judicial system of law can sit back and smile and act nonchalantly as if nothing had happened. The court must act swiftly and strike down an illegal contract.

[34] I would therefore, in my judgment hold that the six cheques on which the plaintiff is claiming is deprived of any legal force. Being a *nudum pactum* they cannot be sued upon for being void.

Section 31. Agreements by way of wager void

[35] Section 31(1) states that:

> Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to *be won on any wager*, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing.

[36] Section 31(2):

> This section shall not be deemed to render unlawful a subscription or contribution, or agreement to subscribe or contribute, made or entered into for or toward any plate, prize, or sum of money, of the value or amount of five hundred ringgit or upwards, to be awarded to the winner or winners of any horse-race.

[37] Apart from the exception under s 31(2) which is applicable to approved horse-racing, s 31(1) of the Contracts Act does not add anything new to what is already stated in s 26 of the Civil Law Act 1956. Section 31 is in pari materia with s 30 of the Indian Contracts Act. A

[38] In the case of *Aspinall Curzon Ltd v Khoo Teng Hock* [1991] 2 MLJ 484 ('*Aspinall Curzon*') the plaintiff, a licensed gambling casino, *obtained in the High Court of England a judgment* against the defendant and subsequently *applied to the High Court in Kuala Lumpur to have the judgment registered under* s 4 of the Reciprocal Enforcement of Judgments Act 1958. The application was granted by the senior assistant registrar and the defendant's application to set aside the order was dismissed. The defendant appealed to the judge in chambers. On appeal, the defendant argued that the cheques which were given to the plaintiff (in exchange for cash and gaming chips) were given for illegal consideration, or alternatively that the judgment was for gambling debt, and should not be enforced, for being against public policy. B C D

[39] It was held, in dismissing the defendant's appeal, that:

(1) Had the contract been entered in this country it had been so executed with lawful consideration, and s 24 of the Contracts Act 1950 cannot apply to make it void. E

(2) The cheques were issued in exchange for cash and gaming chips for purposes of gaming at a licensed gaming casino. It is not for an unlawful purpose by the law of England. Had such transaction occurred in this country, it is a lawful transaction provided that the gaming is done in a gaming premises licensed by the Finance Minister under s 27A of the Common Gaming House Act 1953. The enforcement of the UK judgment cannot be considered as against the public policy of placecountry-regionMalaysia. F

[40] Eusoff Chin J (as he then was) quite rightly decided to dismiss the appeal in *Aspinall Curzon* as his decision was based on clear statutory provisions. However, his Lordship proceeded further to venture certain obiter observations on the law which seem to make no distinction between a legal gaming contract under English Law on the one hand and a void contract under s 26(1) of our Civil Law Act on the other hand. This obiter dictum attracted adverse comments from G.P. Selvam J in *Star Cruise*. With respect, I must say that the impugned dictum in *Aspinall Curzon* is neither analytically sound in terms of settled law nor warranted in the context of the fact matrix of the appeal before His Lordship. Thus, clearly in my view s 31(1) and s 26(1) would apply unless the wagering or gaming is licenced here where the contract is sought to be enforced, since if so licenced, the pointed sanctions of these provisions are suspended and it is not against public policy. This would explain the rationale of the decision of *Tan Hong Woon* (infra). It is highly pertinent to note that in *Aspinall Curzon*, the plaintiff had merely sought to have the judgment, secured from an English Court, registered in our jurisdiction under our own statutory provision being s 4 of the Reciprocal Enforcement of Judgments Act 1958. This is not what the plaintiff in the instant case had sought to do, that is, to register and G H I

enforce here a judgment first obtained from the Queensland, Australia Court. But they had indeed sued upon a cause of action here based on the said six cheques.

[41] In *Sun Cruises Ltd v Overseas Union Bank Ltd* (1999) 3 SLR 404, when G.P. Selvam J again had occasion to deal with a similar situation, he said:

> Finally, the circumstance that gaming itself was lawful and not illegal under a local or foreign statute does not make it valid. It is settled law that the granting of a licence to operate a casino cannot nullify the force and effect of s 6(1) of the Civil Law Act. See *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL) illegality and ineffectiveness are two entirely different legal concepts governed by 2 different chapters of the law.

[42] In *Las Vegas Hilton Corp v Khoo Theng Hock Sunny* [1997] 1 SLR 341 Chao Hick Tan J (at p 352H para 54) expressed the following views:

> Section 6 [of the Civil Law Act] does not render gambling illegal. All that it says is that a wagering contract is void and you cannot sue on it: neither can you sue to recover any wagering price. However, the legislature has intervened and rendered certain forms of gambling illegal by enacting the Betting Act and the Common Gaming Houses Act. The former seeks to suppress common-betting houses, betting in public places and bookmaking and it deems a common betting-house to be a common nuisance and contrary to law; the latter seeks to suppress common gaming houses, public gaming and public lotteries and it declares every common gaming house to be a common and public nuisance contrary to law. *However, in both acts, powers are given to the minister to grant exemptions.*

[43] Reference should also be made to the country-regionplaceSingapore case of *Loh Che Song v Liew Yong Chian* [1998]2 SLR 641 A at p 646 where His Lordship Choo Han Teck CJ had this to say (at p 646):

> The application of Singapore law would, therefore, include the Common Gaming Houses Act. However, as that is a penal statute, before it can have any effect, there must be evidence of commission of an offence under its provisions. In this case, in the absence of any evidence as to the nationality of the vessels or that gambling occurred within Singapore territorial waters, the Common Gaming Houses Act is irrelevant to the issues at hand. No court can in these circumstances say that the Common Gaming Houses Act have been breached. The defendant had not proved, the burden being on him, that he and the plaintiff had committed an illegal act. If gambling occurs outside Singapore waters the Act does not apply.
>
> Section 6 of the Civil Law Act, on the other hand does not create any offence. It renders a gaming or wagering contract null and void …

[44] More recently, in *Star City Pty Ltd v Tan Hong Woon* [2001] 3 SLR 206 Tan Lee Meng J was closer to the mark when referring to s 5(2) of the Civil Law Act Singapore (which is in pari materia with our s 26(2)). He observed that:

> Section 5(2) casts a larger shadow on gambling transactions than s 5(1). It is a procedural section which bars from the courts in Singapore any action to recover, inter alia, any sum of money alleged to have been won upon a wager, regardless of whether or not the wager was concluded in Singapore or elsewhere and *whether or not the wagering contract, if made abroad, was lawful at the place at which it was made."*

[45] The following proposition in law is set out in *Halsbury's Laws of England* 4th Ed, Reissue) Vol 8(1) para s 1066 and 1081:

> Whereas matters of substantive law are governed by the lex causae, namely the law applicable under the English rules for the choice of law, all matters of procedure are governed by the lex fori, namely the law of the country in which the action is brought.
>
> In so far as the Gaming Act 1845 enacts that no suit is to be brought or maintained to recover any sum of money or valuable thing alleged to have been won upon any wager, *it is a statute effecting procedure, and therefore no actions lies in England for money won upon a wager in a foreign country, even though the wager is lawful by its proper law.*

[46] In *Chaplin v Boys* [1969] 2 All ER 1085 in the House of Lords Lord Hodson said at p 1092I:

> The nature of a plaintiff's remedy is a matter of procedure to be determined by the *lex fori*.

[47] And, Lord Wilberforce added (at p 1106C):

> The *lex fori* must regulate procedure, because the court can only use its own procedure, having no power to adopt alien procedures.

(Note: s 26 of the Civil Law Act 1956 Malaysia is a word for word re-enactment of s 18 Gaming Act 1845 and s 1 of the Gaming Act 1892 England.)

[48] The above proposition can also be found in *Hill v William Hill (Park Lane) Ltd***.** [1949]SLR 452 at pp 481–482. Touching on s 1 of the Gaming Act 1892 of England which is in pari materia with s 26 of our Civil Law Act 1956 Malaysia, Lord Radcliffe, in the House of Lords, had this to say:

> the second, or procedural, part is introduced by the word 'and'; the words 'alleged to be won' are used to describe the sum of money of which recovery by legal action is forbidden; the proviso refers to what has gone before as 'this enactment.' It may be true that, if the view that I have suggested is right, the first part of the section would have sufficed to procure the failure of actions to enforce gaming or wagering contracts and that the second part would accordingly be tautologous, in the sense that it was unnecessary. I hesitated to accept even the basis of the argument. The second part, being *lex fori*, might well apply to relieve our courts of the duty of adjudicating on foreign wagering contracts which by the ordinary rules of private international law would escape invalidation by the first part.

[49] It is interesting to note that in *Jupiters*, His Lordship Ramli J made the following comments on the above passage in William Hill:

> The Court can therefore look fruitfully to English cases that have considered s 18 of the Gaming Act 1845 for guidance to the interpretation of our s 26 (2) of the Civil Law Act 1956. The high water mark of exposition of s 18 English Gaming Act 1845 is the case of *Hill v William Hill (Park Lane) Ltd,* (1949) AC 530 decided by the House of Lords.
>
> In that case, the debate in the House of Lords was whether the first part of s 18 English Gaming Act 1845 controlled and interpreted the second part of the same section and was "in effect tautological" or in fact had a force of its own."

A In our s 26 of the Civil Law Act 1956, those two parts have been separated to subsection (1) and subsection (2). This is precisely what the majority of the House of Lords concluded. Lord Green's analysis of the section is instructive in our understanding of the ambit of subsections (1) and (2) of s 26 of the Civil Law Act 1956

B **[50]** The question of public policy is:

Whether our courts should help in the enforcement of gambling contracts technically falling outside local statutory prohibitions, but with potentially deleterious effects on the social and economic fabric of our society.

C **[51]** The Malaysian stand is expressed in the following cases:

[52] *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong (sued pursuant to s 9(c) of the Societies Act 1966 in his capacity as the Chairman of the Kelab Lumba Kuda Sandakan)* [1995] 3 CLJ 256 at 278 ('*Sababumi*') where Ian Chin J said:

D It is a notorious fact and I can take judicial notice that the Government of Malaysia wanted nothing to do at all with gaming in so far as that is possible. That was why the government decided not to conduct the lottery tickets themselves. But, simply abandoning gaming would mean leaving it to the realm of the underworld. Instead, of that, the government decided to let another group of people in the country run gaming activities legally but the E government still shows its disdain for gaming and that is why all betting ticket must bear the words that gaming is illegal under the Islam religion. It can be accepted that generally, the culture of all the races in Malaysia eschew gaming. What is the attitude of the Court then towards gaming? Without doubt, the court should show the same attitude of disapproval as that shown by the government and by our society. Therefore, the Court must not do anything that can be interpreted as sanctioning or approving gaming.

F and, in *Banque Nasionale De Paris v Wuan Swee May & Anor* [2000]3 MLJ 587 at p 597 F Abdul Hamid Mohamad J (as he then was) observed:

So, when a Malaysian court is considering the issue of public policy in Malaysia, it should look at Malaysian law, Malaysian government policy, Malaysian moral values and all other G relevant factors then prevailing in Malaysia, including what I have mentioned earlier. I know that some people may not feel comfortable with the use of the words 'government policy'. In my view, it is a relevant factor. I am also of the view that it is wrong to 'marginalize' government policies in considering what is the public policy in Malaysia. Who can better claim to represent the public than a democratically elected government? Who is more responsible for the welfare of the people and the country than the government of that H country? Who is more responsible for the law and order, economy, education and indeed everything affecting the people and the country, than the government of that country?

[53] The Singapore stand has been well expressed and summarized by Yong Pung How CJ, in the Court of Appeal, in *Star City Pty Limited v Tan Hong Woon* [2002] I 2 SLR 22 at p 37 ('*Star City*'). This was what the Right Honourable Chief Justice had to say:

What then is this aspect of local public policy that militates against the recovery of moneys won in foreign wagering contracts which are valid and enforceable overseas? It is clear that gaming and wagering contracts were never considered to be illegal in common law.

The distinction which the law makes between wagering contracts and others is therefore entirely the creation of statute. In line with the position in England, the Singapore legislature has long departed from the historical position that gambling and gaming, especially when on credit, is a social vice that has to be eradicated at all costs. It now recognizes that gambling can be permitted for its entertainment value if it is strictly controlled and regulated by the relevant authorities. Gambling per se is no longer considered to be contrary to the public interest and this accounts for the various forms of legalized gaming and gambling which currently exists in Singapore such as 4-D, Toto, the big Sweep, the Singapore Turf Club, etc. Therefore there is no general purposes of gambling abroad, so long if the transaction is indeed a genuine loan and one which is valid and enforceable according to that foreign law.

However, what is objectionable is courts being used by casino to enforce gambling debts disguised in the 'form' of loans. Valuable court time and resources that can be better used elsewhere are wasted on the recovery of such unmeritorious claims. The machinery of the courts cannot be used indirectly to legitimize the recovery of moneys won upon wagers overseas when similar relief would be refused for moneys won upon wagers in Singapore. Hence in order to give full effect to s 5(2) of the Civil Law Act, which provides that no action can be brought or maintained to enforce gambling debts, the courts of the forum cannot be prevented by foreign law from investigating into the true nature of the transaction. The courts of justice must remain out of bounds to claim for moneys won upon wagers, however cleverly or covertly disguised: *Star Cruise Services v Overseas Union Bank*. It is in this sense that the earlier decision in *Las Vegas Hilton Corp v Khoo Teng Hock Sunny (above) can be distinguished*; having felt that there is no public policy against gambling per se, the court naturally did not go further to re-characterise the transaction. However, once it is recognized that the courts should not, as a matter of principle and public policy, act as gambling debt collectors for foreign casinos, we are then obliged to investigate further according to the *lex fori*.

[54] In *Hope v Hope* (1857) De GM & G 731; 44 ER 572 where Turner J said:

I think, that, when the courts of one country are called upon to enforce contracts entered into in another country, the question to be considered is not merely whether the contract sought to be enforced is valid according to the laws of the country in which it was entered into, but whether it is consistent with the laws and policy of the country in which it is sought to be enforced. A contract may be good by the law of another country, but if it be in breach, fraud, or evasion of the law of this country, or contrary to its policy, the courts of this country cannot, as I conceive, be called upon to enforce it.

[55] Yong Pung How CJ in *Star City Pty Limited* at p 36 para 29 went on to opine:

We are of the view that in order to determine whether the enforcement of a foreign cause of action would be contrary to forum policy, the court must necessarily apply its mind and the lex fori to determine its true substance. Otherwise, the forum would no longer be master of its own home and local public policy concerns easily circumvented by 'forum-shopping'. There is another way to support this conclusion. We have earlier concluded that s 5(2) is a procedural provision which applies whenever foreign causes of action are being enforced in Singapore. The clear and peremptory words of s 5 of the Civil Law Act make clear that it is intended by the legislature to be a forum mandatory provision which parties cannot avoid by contracting out of. Our courts must hence pay attention to the essence of foreign transactions and must forcefully resist all attempts to evade the provisions of the Civil Law Act.

[56] The underscored dicta of Turner J and Yong Pung How CJ in the above two cases would, in my view, represent the current prevailing law that I would have to apply in the instant case.

[57] After a careful distillation of a welter of English and Singapore cases, I think the law applicable to cases of recovery of moneys due on wagering contracts or gambling debts could quite simply be reduced to the following propositions. The question whether a wagering or gaming debt is recoverable would involve two different and separate considerations which involve two concepts, namely Lex Loci and Lex Fori. A gaming or wagering contract may be lawful and legal under its Lex Loci — being the law of the country in which the wagering or gaming activity is carried out or the transaction where it is performed. Yet, it is settled that the Lex Fori of the action or suit — being the law of the country in which the action is brought or sought to be litigated — that should prevail over the Lex Loci of the wagering transaction. Thus, even if a wagering contract is lawful and not void according to its Lex Loci — such as through the granting of exemptions or licence to a Casino by the Minister — it is still unenforceable if it is a null and void contract according to the Lex Fori of the action. Obviously, the Lex Fori of the current action before me is Malaysian Law.

[58] The current state of the law could, in my view, also be simply stated thus: the enforcement of a right or a cause of action is a matter for the forum of the cause of action itself. The Lex Fori does not interfere in the validity of the transaction but since it is the place where the action is to be litigated, it has the right to determine the situations when foreign causes of action can be enforced. In private International Law it is an established principle that the court of the forum will not enforce a foreign cause of action that is contrary to local public policy. In this regard we may rely on the work of *Dicey and Morris* (13th Ed) at p 81:

> Rule 2 — English courts will not enforce or recognize a right, power, capacity, disability, or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English Law.

[59] It is pertinent to note that the plaintiff in *Jupiters* is the same plaintiff in this suit, referred therein as a licensed casino operating in the State of Queensland, Australia and, the Cheque Cashing Facility ('CCF') detailed by Ramli J in *Jupiters* at pp 9–13 is similar to the Cheque Cashing Limit Application in this suit (see pp 1–9 the 'Ikatan Dokumen-Dokumen').

[60] Ian HC Chin J has comprehensively and admirably dealt with the issue of Public Policy (at pp 392–394) in the *The Ritz Hotel Casino Ltd & Anor v Datu Seri Osu Haji Sukam* [2005] 6 MLJ 760 ('*Ritz Hotel Casino*') case. However, with the greatest respect to the good judge I must say that in that case His Lordship had failed to accord crucial focus on the patent fact that the applicant had merely applied to register a judgment legally obtained in England pursuant to the Reciprocal Enforcement of Judgments Act 1958, but had not sought to enforce a cause of action founded on a gaming or wagering contract — in which case the Lex Fori of the

country where the cause of action is sought to be litigated would have to prevail. Surely, it would be entirely consistent with our public policy for our Courts to accord due recognition to any reciprocal arrangements between our country and another. The factual matrix in the case of *Ritz Hotel Casino* is vastly different from that obtaining in the instant case. Here, the plaintiff had sought to institute an action (which constitutes enforcement of his alleged rights) to recover moneys due upon an acknowledged wagering contract, which is expressly proscribed, by s 31(1) of the Contracts Act 1950, not only in the following strong terms: 'no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made' but also states that: 'Agreements by way of wager are void.' In *Ritz Hotel Casino*, the defendants ought to be precluded from going behind the English judgment by submitting on our public policy. *Ritz Hotel Casino* and *Aspinall Curzon* ought to be distinguished from this case as those two cases only concern the registration of foreign judgments that has not only been provided for but sanctioned by statute, which enjoins our courts to allow registration if the papers are in order.

THE THIRD ISSUE

Whether the applicable law to the substantive issue is that of Queensland Australia or Malaysia?

Rational and Decision

[61] Even if Queensland's law is applicable, I find that the plaintiff has failed to plead that it has met the requirements laid down pursuant to Queensland Casino Control Act 1982. The Affidavit of Xavier Walsh affirmed on 18 July 2005 (both filed herein) has also failed to depose such facts. Notwithstanding this, clearly, based on the English, Singapore and Malaysian cases cited above, all of which had arrived at consistent decisions, and which I am minded to adopt, I hold that since the cause of action (arising solely from the dishonour of the said six cheques issued upon a wagering contract) is sought to be litigated here, Malaysian Law must be applicable. In any event, it is also not the plaintiff's case that there was an expressed agreement by the defendants that the Queensland's law shall apply in the event of any dispute between the parties.

[62] It has been submitted that the relevant sections of the Australian laws are the Casino Control Act 1982, Queensland, Australia ("CCA") ss 66, 67, 68, 69 and 70, Casino Control Regulation 1984 (Regulation 14 Queensland) Australia, and ss 248 and 249 of the Racing and Betting Act 1980 ('R&BA') of Queensland, Australia. It is defendant's contention — and I am satisfied it has substance — that the said six cheques claimed were not exchanged for Chip Purchase Vouchers in value equal to the amount of each of the said six cheques as required by s 68(1) of the CCA. Furthermore, s 66 (2) removes from the said prohibition the operation of a cheque cashing facility as provided for in s 68 (1) of the CCA which reads:

68.(1) Subject to subsection (2), a casino operator may issue to a person, for the purpose of gaming by the person and in exchange for a cheque from the person, a chip purchase voucher or chip purchase vouchers of a value equal to the amount of the cheque.

[63] On the claim against the second defendant, it is crucial to note that no cause of action at all has been pleaded against her in the statement of claim. The Second defendant was brought in as a co-defendant solely because she is the wife of the first defendant and is the co-signatory of their current account bearing account number 17140140094534011 in Citibank Berhad, Jalan Ampang, Kuala Lumpur. It is undisputed that she did not sign any of the said six cheques. Also to note is that the provisions in ss 31 and 71 of Cheques Act 1986 Queensland, Australia clearly state that notwithstanding that a cheque may be drawn on a joint account, only the drawer of the cheque will be liable as the drawer. Hence, a cursory reference to these two provisions of the cheques act is sufficient to negate the plaintiff's pleaded claim against the Second defendant. Consequently in my judgment, the plaintiff's claim against the second defendant cannot be sustained under the laws of Malaysia or that of Queensland, Australia.

CONCLUSION

[64] I hold therefore that the first and the second issues in the present proceedings must be answered in the negative in favour of the defendants, and the third issue I am satisfied that Malaysian law prevails over Queensland law. In the event, it is ordered that this suit against the defendants be dismissed with costs to the second defendant, but with no costs to the first defendant. With my decision in respect of the above three agreed issues, it is unnecessary for the other issues of fact to go to trial. The plaintiff's claim against the defendants, being in essence an action to recover money lost upon a wager falls within the ambit of s 26(2) of the Civil Law Act 1956 and s 31(1) of the Contracts Act 1950 which expressly proscribe the recovery of wagering debts. Neither can the Casino claim upon the dishonour of the said six cheques as a recovery on the underlying gambling contract is contrary to public policy here.

Suit against defendants dismissed.

Reported by Sally Kee